No. 85-2120

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In the Supreme Court of the United States

OCTOBER TERM, 1986

RICHARD R. WHEELER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's incriminating statements were voluntary.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-6a) is reported at 22 M.J. 76. The opinion of the Army Court of Military Review (Pet. App. 7a-12a) is reported at 18 M.J. 823.[1]

JURISDICTION

The judgment of the United States Court of Military Appeals was entered on April 28, 1986. The petition for a writ of certiorari was filed on June 25,

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[1] The appendix to the petition erroneously captions Appendix B as the opinion of the Court of Military Appeals, rather than as the opinion of the Army Court of Military Review.

1986. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. II) 1259(3).

STATEMENT

Petitioner, a member of the United States Army, was tried on December 13, 1982, by a general court-martial at Fort Lewis, Washington. Petitioner was convicted on two counts of rape and one count of forcible sodomy, in violation of Articles 120 and 125, Uniform Code of Military Justice (UCMJ), 10 U.S.C. 920 and 925. He was sentenced to life imprisonment, a dishonorable discharge, total forfeitures of pay and allowances, and a reduction in rank. The convening authority, the Commanding General of the Ninth Infantry Division at Fort Lewis, reviewed the case pursuant to Article 60, UCMJ, 10 U.S.C. (Supp. III) 860, and approved the findings and sentence.[2] The Army Court of Military Review affirmed the findings and sentence (Pet. App. 7a-12a). The Court of Military Appeals then affirmed the decision of the Court of Military Review (Pet. App. 1a-6a).

1. The evidence adduced at trial, the sufficiency of which is not in dispute, is summarized in the opinion of the Court of Military Review (Pet. App. 8a). Briefly, it showed that at approximately 11:30 p.m. on August 7, 1982, petitioner abducted Teri Collins in her car, while she was stopped at a traffic light in Tacoma, Washington (Tr. 134-137). For the next four hours, while petitioner drove around Tacoma and Fort Lewis, Washington, petitioner threatened

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[2] The Commandant of the United States Disciplinary Barracks at Fort Leavenworth, Kansas, subsequently suspended a portion of petitioner's sentence, allowing him to earn $257.00 per month as long as petitioner continued to satisfy certain conditions regarding his conduct.

and berated Collins, forced her to undress and lie on the floor of her car, locked her in the trunk of her car, demanded money, and raped her (Tr. 116, 133-157, 175-184; GXs 24-30, 32-36, 38-40).[3] At about 3:00 a.m. on September 9, 1982, petitioner followed a similar modus operandi to abduct, rape, and sodomize Grace Ngirmeker (Tr. 72-79, 84-86). Petitioner abducted Ngirmeker in her own car as she was preparing to drive home from a Tacoma bus station, where she worked (*e.g.*, Tr. 71-101, 105-133, 215-218; GXs 1-11, 16-18).[4] Ngirmeker's ordeal lasted for about two and one-half hours, during which time petitioner drove around Tacoma and Fort Lewis.

a. On September 15, 1982, petitioner was identified as the principal suspect in the offenses committed against Grace Ngirmeker (Tr. 106). That evening, military authorities took petitioner into custody for questioning (Tr. 24). Agent Herring of the Army Criminal Investigation Command informed petitioner that he was suspected of kidnapping and rape, and

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[3] The evidence at trial indicated that petitioner raped Collins twice in the early morning hours of August 8, 1982: once in her car beside a road in the Tacoma area, and again on the grounds of Fort Lewis (Tr. 138-140, 147-148). Petitioner was initially charged with two counts of raping Teri Collins (R. 8). The first alleged rape occurred off-post, however, and it was therefore dismissed for lack of subject-matter jurisdiction (Tr. 38-39).

[4] The evidence at trial indicated that petitioner raped Ngirmeker near a Tacoma shopping mall (Tr. 76-79) and then drove onto Fort Lewis (Tr. 83), where he again raped Ngirmeker and forced her to commit sodomy (Tr. 84-86). While petitioner was charged with two counts of raping Ngirmeker (Tr. 7), the first alleged rape occurred off-post and was dismissed for lack of subject-matter jurisdiction (Tr. 38-39).

he advised petitioner of his *Miranda* and statutory rights (Pet. App. 2a, 8a; Tr. 24-28, 107; GX 1).[5] Petitioner acknowledged that he understood Agent Herring's warnings, and he then read and initialed the military form used by Agent Herring (Tr. 27-28, 34; GX 1). Petitioner agreed to waive his rights and to answer questions, and he then waived his rights in writing (Pet. App. 2a, 8a; Tr. 25, 27-28; GX 1). Detective Correll of the Tacoma Police Department then also advised petitioner of his *Miranda* rights (Pet. App. 2a, 8a; Tr. 27-29; GX 2). Petitioner reaffirmed that he understood his rights, and he signed a civilian form acknowledging the receipt of his *Miranda* warnings (Tr. 29; GX 2). Petitioner once again reiterated his desire to waive his rights and to answer questions (*ibid.*).

Detective Correll and Agent Herring questioned petitioner for about an hour concerning the Ngirmeker offenses (Tr. 30-31, 108). During that time, petitioner denied any involvement in those crimes (Tr. 30, 108). Initially, petitioner denied that he had ever been to the bus station in Tacoma where Grace Ngirmeker worked and from which she was abducted (Tr. 30). Petitioner subsequently admitted that he had been at the bus station, but he equivocated about his reasons for being there (*ibid.*).

After an hour of questioning, Detective Correll left the interview room to conduct a photographic display with Grace Ngirmeker, during which Ngirmeker identified petitioner (Tr. 31, 94-95, 108, 129-131). Approximately 15 minutes later, Agent Herring "appealed to [petitioner's] conscience" and told petitioner that he did not believe petitioner's story (Tr.

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[5] See *Miranda* v. *Arizona*, 384 U.S. 436 (1966); Art. 31(b), UCMJ, 10 U.S.C. 831(b).

31). On his own initiative, petitioner then stated that he had been praying to God about his problem (Tr. 31, 123). Understanding "his problem" to mean petitioner's crimes, Agent Herring told petitioner that he, petitioner, and God knew that petitioner had a problem (Tr. 31, 123-124). Petitioner reiterated that he had been praying to God for strength (Tr. 32, 124). Agent Herring then asked petitioner if he would be willing to pray to God for the strength to "go ahead and get this off [his] chest and start living [his] life and turning [his] life around" (Tr. 32; see also Tr. 124). While Agent Herring and petitioner were kneeling, petitioner, in a prayer lasting about 30 seconds, said that he "didn't mean * * * to attack those women" (Tr. 32, 125). Petitioner and Agent Herring then retook their seats, and petitioner stated: "You're right. What you said was true. I did do it" (Tr. 32; see also Tr. 124).

Petitioner twice gave his account of the Ngirmeker offenses, and he drew a sketch to illustrate where he was during his initial encounter with Ngirmeker at the Tacoma bus station (Tr. 33-33a, 114, 124; GX 4). At about 10:15 p.m., Agent Herring prepared a typed statement incorporating petitioner's account of the Ngirmeker kidnapping (Tr. 33a; GX 3). After reading the typed statement, petitioner signed an affidavit summarizing its contents (Tr. 33a, 108-113, 124-125; GX 3).

b. Prior to trial, petitioner moved to suppress his statement on two grounds: (1) the statement was unlawfully induced by a CID agent's promise of help from a psychiatrist, and (2) petitioner had not been made aware that he could terminate the interview at any time (Pet. App. 3a; Tr. 17-18; AX I). After an evidentiary hearing, the trial judge denied his

motion and issued an oral ruling containing findings of fact (Tr. 39-41). The trial court ruled that petitioner's statement was "given * * * freely, voluntarily, and without any unlawful inducement or coercion" (Tr. 41). Regarding petitioner's specific complaints, the court found that there had been no mention of a psychiatrist until after petitioner had made his statement,[6] that petitioner had been advised by both agents of his right to terminate the interview at any time, and that petitioner understood that right (Tr. 40; Pet. App. 3a). The trial court also found that the circumstances surrounding petitioner's prayer did not constitute unlawful coercion or an unlawful inducement, but consisted only of an appeal to petitioner's conscience (Tr. 40-41).

2. On appeal to the Court of Military Review, petitioner argued for the first time that "Agent Herring's appeal to [his] religious beliefs was psychologically coercive in view of his youth, limited intelligence, mental disorder (schizotypal personality) and his 'Judeo-Christian' belief in 'the cleansing power of confession'" (Pet. App. 4a). The Court of Military Review independently reviewed the evidence relating to petitioner's statement[7] and concluded that petitioner's statement was voluntary (*id.* at 9a). The Court of Military Appeals also concluded that, in light of the totality of the circumstances, petitioner's statement was voluntary (*id.* at 4a-6a).

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[6] Agent Herring testified that, after petitioner had given his statement, petitioner asked him if he could recommend a psychiatrist (Tr. 33).

[7] Art. 66(c), UCMJ, 10 U.S.C. 866(c), authorizes a court of military review to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses."

ARGUMENT

Petitioner contends (Pet. 4-7) that his statements were involuntary because the interviewing agent's appeal to his religious convictions, operating in conjunction with petitioner's personality disorder, unfairly overbore his will.

Determining whether a suspect's statements are voluntary requires a court to consider the totality of the circumstances. See, *e.g.*, *Miller* v. *Fenton*, No. 84-5786 (Dec. 3, 1985), slip op. 8; *Oregon* v. *Elstad*, No. 83-773 (Mar. 4, 1985), slip op. 19; *Frazier* v. *Cupp*, 394 U.S. 731, 739 (1969). In this case, the military courts considered all the facts surrounding petitioner's statements, including those recited in the petition, and determined that his statements were voluntarily given and that the waivers of his constitutional and statutory rights were valid (Pet. App. 2a-5a, 8a-9a).[5] Petitioner does not argue that the lower courts applied the wrong legal standard; rather, his claim is that the lower courts were wrong in concluding that his statements were voluntary. That fact-bound claim does not warrant review by this Court.

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[5] The trial court did not consider the fact that appellant suffered from a personality disorder (Tr. 19-36, 39-41), because no evidence regarding his condition was proffered during the evidentiary hearing on petitioner's motion to suppress (*ibid.*). Rather, petitioner offered the testimony of a psychiatrist concerning his personality disorder as a possible mitigating factor during the sentencing portion of his court-martial (Tr. 253-263). The Court of Military Appeals, however, specifically considered petitioner's psychiatric condition and concluded that it did not render his confession involuntary, either "by itself [or] with other factors in this case" (Pet. App. 5a n.4).

Petitioner argues (Pet. 4-5) that the Court of Military Appeals failed to give sufficient weight to the interviewing agent's appeal to his religious convictions. Petitioner did not raise that claim at trial, however; instead, he claimed that his statement was the product of an unlawful inducement (*i.e.*, the promise of psychiatric help), and that he did not understand his *Miranda* rights. In any event, the reviewing courts considered petitioner's claim and properly concluded that the agent's appeal to petitioner's religious beliefs did not render his statements involuntary.

Agent Herring's manner of questioning did not involve an interrogation technique that was "so offensive to a civilized system of justice that [it] must be condemned" (*Miller* v. *Fenton*, slip op. 5; see *Moran* v. *Burbine*, No. 84-1485 (Mar. 10, 1986), slip op. 19); *Frazier* v. *Cupp*, 394 U.S. at 738-739; *Culombe* v. *Connecticut*, 367 U.S. 568, 576 (1961) (opinion of Frankfurter, J.) ("[A] confession made by a person in custody is not always the result of an overborne will. The police may be midwife to a declaration naturally born of remorse, or relief, or desperation, or calculation.").[9] Petitioner initiated the subject of his religious beliefs in a manner indicating an expression of remorse. The interviewing agent thereafter simply followed up on petitioner's comments. The agent's conduct in doing so fell far short of being "violative of canons fundamental to the 'traditions and conscience of our people' " (*Moran* v. *Burbine*, slip op. 18 (cita-

[9] The trial court, the Court of Military Review, and the Court of Military Appeals characterized Agent Herring's appeal to petitioner's religious convictions as nothing more than an appeal to petitioner's conscience (Tr. 41; Pet. App. 5a, 9a).

tion omitted)). In fact, in his testimony in support of his suppression motion, petitioner did not even mention the agent's appeal to his religious convictions (Tr. 19-23; see Pet. App. 5a). Rather, petitioner claimed the reason he made the incriminating statements was because the agent promised him the assistance of a psychiatrist if he confessed (Tr. 21-22; Pet. App. 5a).[10]

Beyond that, the interviewing agents meticulously advised petitioner of his constitutional and statutory rights. As this Court has observed, "[t]he fact that a suspect chooses to speak after being informed of his rights is * * * highly probative" on the issue of voluntariness (*Oregon* v. *Elstad*, slip op. 19). See also *Frazier* v. *Cupp*, 394 U.S. at 739; *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 249 (1973). Petitioner waived his rights and consented to answer questions before the topic of religion was mentioned (Pet. App. 5a). In addition, the circumstances of the agent's questioning were not oppressive. Petitioner was provided with water (Tr. 33a-34, 124) and was allowed to use the latrine (*ibid.*). He never requested that the interview be terminated (Tr. 33a-34), and he never asked to speak with a lawyer (*ibid.*). He made no complaints about his physical condition (Tr. 34); he was not questioned for an unduly long period of time (Tr. 24, 21, 33a); and he appeared alert and coherent throughout (Tr. 23, 36, 123).[11] Under all these cir-

[10] The trial judge rejected this testimony as a matter of fact (Tr. 40), and, in any event, petitioner's own testimony indicates the agent's appeal to petitioner's conscience had no appreciable impact on petitioner's decision to speak.

[11] Compare, *e.g.*, *Mincey* v. *Arizona*, 437 U.S. 385, 401 (1978) (statements were the product of the "virtually continuous questioning of a seriously and painfully wounded man

cumstances, the military courts properly concluded that petitioner's will was not overborne by the agent's appeal to his religious convictions.

Petitioner also relies (Pet. 4-6) on the testimony of a defense psychiatrist who stated that in his view petitioner suffered from a schizotypal personality disorder (Tr. 255-257, 259-260, 262, 267-268; DX A).[12] That testimony, however, does not aid petitioner. First, the psychiatrist did not testify at the suppression hearing or the trial; he testified at the sentencing hearing. Because petitioner chose not to present the psychiatrist's testimony until sentencing, he cannot fault the trial judge for failing to consider that evidence in connection with the suppression motion. In any event, the psychiatrist did not testify that petitioner lacked the capacity to give a voluntary statement (see Tr. 253-270). Although the defense psychiatrist testified that petitioner suffered from a

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on the edge of consciousness"); *Davis* v. *North Carolina*, 384 U.S. 737, 741-747 (1966) (an impoverished, mentally deficient suspect held incommunicado for 16 days, given barely adequate nourishment, interrogated intermittently each day, and not effectively advised of his constitutional rights); *Blackburn* v. *Alabama*, 361 U.S. 199, 200, 204, 207-208 (1960) (compelling evidence that suspect was insane when he confessed after eight to nine hours of sustained interrogation in a tiny room, which was at times filled with police officers); *Fikes* v. *Alabama*, 352 U.S. 191, 193-197 (1957) (suspect with a third grade education and suffering from schizophrenia held incommunicado in jail for a week, questioned several hours at a time over the course of the five days preceding his first confession, and deprived of the opportunity to see counsel); see generally *Schneckloth*, 412 U.S. at 226.

[12] The defense psychiatrist based his diagnosis mainly on what petitioner told him during two sessions totalling about two hours (Tr. 263-267).

schizotypal personality disorder,[13] the psychiatrist also testified that petitioner was not schizophrenic or psychotic (Tr. 260, 268). Moreover, the defense psychiatrist concluded that petitioner was sane at the time of his crimes and that petitioner possessed the mental capacity to understand the proceedings against him and to cooperate intelligently in his defense (Tr. 263; DX A, at 2).[14] Petitioner's mental condition placed him in a far different position from the defendant in *Fikes* v. *Alabama*, 352 U.S. 191, 193 (1957) ("schizophrenic and highly suggestible") or in *People* v. *Connelly*, 702 P.2d 722 (Colo. 1985), cert. granted *sub nom. Colorado* v. *Connelly*, No. 85-660 (Jan. 13, 1986) (psychotic whose mental disease compelled him to confess), and petitioner's situation cannot be equated with the circumstances in those cases.[15] Accordingly, the lower courts' rulings

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[13] According to the defense psychiatrist, petitioner displayed signs of social isolation, a failure to establish adequate rapport when communicating, vague speech patterns, hypersensitivity to rejection by women, and magical thinking, as reflected by his belief that his former girfriend had placed a curse on him (Tr. 256, 257).

[14] Petitioner also suggests (Pet. 5-6) that his intelligence was low. In fact, in his pre-enlistment tests petitioner exceeded the minimum score in all ten aptitude areas (GX 52, Item 8 of Form 2-1). Petitioner was 22 years old, he was literate, he was a high school graduate, and he had served on active duty in the Army for more than two years (Tr. 22-23; GX 52). As the Court of Military Appeals concluded (Pet. App. 5a), the evidence demonstrated no defect in petitioner's maturity or intelligence.

[15] There is no need to hold this case pending the Court's decision in *Connelly*. In *Connelly*, there was undisputed evidence that the accused suffered from a severe mental disease;

that petitioner's statements were voluntary are correct and do not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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the trial court found that the defendant was psychotic and that his psychosis compelled him to confess. 702 P.2d at 725. By contrast, in this case there was undisputed evidence that petitioner was not psychotic, and there was no evidence that his statements were the product of his personality disorder. Accordingly, the result in this case would not be affected even if the Court should affirm the judgment in *Connelly*.

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